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In the Supreme Court of Pennsylvania, 1859.

THE DELAWARE AND HUDSON CANAL COMPANY *vs.* JOHN TORREY.

1. It is a settled principle, that whenever any act injures another's rights and would be evidence in future in favor of a wrong-doer, an action may be maintained for an invasion of those rights; although there be no proof of any specific injury.
2. Hence, when saw-dust from the defendant's mill floated down into the plaintiff's basin, although it alone might not cause inconvenience to the plaintiff; but accompanied with saw-dust from other mills, the plaintiff's flowage was obstructed: it was held, that the defendant's deposit of any saw-dust was an actionable injury, inasmuch as it violated the plaintiff's rights.

This case came up on a writ of error to the Common Pleas of Wayne County.

The opinion of the court was delivered by

STRONG, J.—The first, second, third, and fifth assignments of error are substantially the same. The court was requested to instruct the jury that if the whole or any part of the saw dust made at the defendant's mill, came into the company's basin, and there intermingled with the other matter, obstructing the navigation, and making it necessary for the company to remove it, then the verdict should be for the plaintiff. This proposition the court refused to affirm, but on the contrary charged the jury that if they believed the saw dust from the defendant's mill alone, unaccompanied and unmixed with saw dust from other mills would not inconvenience the plaintiffs, they could not recover. Thus the jury were led to believe that the deposit of saw dust by the defendant in their basin was not sufficient to enable the plaintiffs to maintain an action, unless *it alone* caused a practical inconvenience and obstruction to the navigation. This we hold to have been erroneous, and the error was a radical one underlying the whole charge. It was repeated in various forms, and covered nearly the whole ground of contest in the case. The facts as developed by the evidence seem to leave no doubt that the dust from the defendant's mill, falling into the stream, was carried by the current through the feeder of the canal into the basin, and there deposited. The defence consisted mainly, not in a denial of this fact, but in there assertion that if there had not been intermingled with it saw dust culm and other substances from other mills, no

obstruction of the navigation would have been caused. In the way in which the learned judge put the case to the jury, they must have understood that if the facts were as contended by the defendant, there could be no recovery, that the dust from Mr. Torrey's mill alone must have been *of itself* an obstruction. If this is so, then the basin of the plaintiff might have been filled without any legal injury to them, for the contributors to the deposit might have been so numerous that the share contributed by each would be inappreciable. Or suppose there had been no other saw-mill on the stream than that of the defendant's. In a course of years that might have filled the basin with its dust, and yet the year's quantity deposited during any period of six might not *of itself* have caused any obstruction. If the doctrine avowed by the learned judge be correct, the wrong would be remediless. The court confounded the degree with the existence of the injury, or perhaps failed to distinguished between a wrong to the present enjoyment, and an injury to the right of enjoyment. The defendant cannot justify himself by showing that others were guilty of similar and concurrent wrongs. He had no right to cause any saw dust to be deposited in the plaintiff's basin. His first deposit, therefore, was an actionable injury, though it caused no practical inconvenience, because it was a violation of the plaintiff's right, and because continued deposition for twenty-one years would have given to him an easement, a right to continue it, as was ruled in *Wright* vs. *Williams*, 1 M. & W. 77, and as we held in *Jones* vs. *Crow*, a case decided at this term. The commencement of the acquisition of such an easement is with the first user, and of course, the first user is an invasion of the rights of the owner of the servient tenement.

That an injury to a right is actionable, though the damage be inappreciable, is settled by abundant authority. In a note to *Mellor* vs. *Spateman*, 1 Wm. Saunders, 346, Mr. Sergeant Williams says, "Whenever any act injures another's rights, and would be evidence in future in favor of the wrong doer, an action may be maintained for an invasion of the right without proof of any specific injury, and this seems to be a governing principle in cases of this kind, as in the case of *Patrick* vs. *Greenaway*, tried before Mr. J. Lawrence, at Oxford Spring Assizes, 1796, which was an action of

trespass for fishing in the plaintiffs several fishery; it appeared in evidence that the defendant fished, but did not take any fish, neither was it alleged in the declaration that the defendant caught any fish. The plaintiff obtained a verdict, which in the following term, Easter, 1796, the defendant moved to set aside; but the Court of Common Pleas refused even a rule to show cause upon the ground that the act of fishing was not only an infringement of the plaintiff's right, but would thereafter be evidence of the using and exercising the right by the defendant, if such an act were overlooked." This is expressive of the existing law in England, as announced in numerous cases. Upon this principle many actions are maintained for disturbance. So in *Young* vs. *Spencer*, 10 B. & C., 145. Lord Tenterden observed that "it seems to be clearly established that if any thing be done to destroy the evidence of title, an action is maintainable by the reversioner." The American authorities are almost uniform to the same effect. Thus in *Blanchard* vs. *Baker*, 8 Greenleaf, 253, which was an action for diverting water from a mill site, which had never been used, it was said by the court that a "mill privilege not yet occupied is valuable for the purpose to which it may be applied. It is a property which no one can have a legal right to impair or destroy by diverting from it the natural flow of the stream upon which its value depends. If an unlawful diversion is suffered for twenty years, it ripens into a right, which cannot be controverted. If the party injured cannot be allowed in the meantime to vindicate his right by action, it would depend upon the will of others whether he should be permitted or not to enjoy that species of property." Very many other cases to the same effect are collected by Mr. Angell in his Treatise on Water Courses, sec. 135, note 4, and section 428, et seq. The same doctrine is the acknowledged law of Pennsylvania, without reviewing the cases at length, it is sufficient to refer to the following: *Kirkham* vs. *Sharp*, 1 Whart. 233; *Williams* vs. *Esling*, 4 Barr, 486; *Pastorius* vs. *Fisher*, 1 Rawle, 27; *Ripka* vs. *Sergeant*, 7 W. & S. 9, and *Miller* vs. *Miller*, 9 Barr, 74. Instead, therefore, of having their attention turned to the inquiry whether the plaintiffs had suffered practical inconvenience from the act of the defendant alone, the jury should have been instructed that if the saw-dust from his mill fell

into the stream and was floated into the plaintiffs' basin and there deposited, the right of action was complete.

We think also that the court erred in saying to the jury that "the company were bound so to construct the canal, and so to use the water of the river Lackawana, if they could reasonably do so, as not to interfere with the rights of others, and if they could not, then to do as little injury as possible. Have they done so? Could that feeder and inlet to the basin have been so built as to have avoided the difficulty complained of, without burdening the company with an unnecessary expenditure of money or interfering with its usefulness? If it could, to that amount of care and caution they should be held." That was presenting to the jury an impertinent issue. If it be admitted that this was all correct in the abstract, what had it to do with the case? Did the court mean to say that if, without unreasonable or unnecessary expense, the canal and feeder could have been constructed so that the saw-dust from the defendant's mill could not have flowed into it, and was not so built; therefore, the defendant had a right to fill the basin with the refuse of his mill? Were the jury to inquire what expense was necessary or what would have interfered with the usefulness of the company? Were they to have determined what would have been the most fit engineering? The canal basin and feeder were completed about the year 1828. They have since been enlarged, but the location remains the same. They were constructed under authority of the State, and the damages were released by Jason Torrey, the father of the defendant, who then owned the lands upon which his saw mill was afterwards built in 1849, or 1850. When the canal and basin were completed it became not only the right but the duty of the plaintiffs to have them kept free from dust or other substances which might then or thereafter obstruct the navigation. If the works were unskillfully erected, without due regard to the rights of individuals, the law furnished a remedy; but it was not by granting permission to set off one tort against another.

The evidence, the admission of which is the subject of the sixth assignment of error, was doubtless inadvertently received. The court subsequently charged the jury that if the defendant could not enjoy a water power on his own premises without depriving others

above or below him of vested rights, he must cease to enjoy it, or answer in damages for the injury done. This ruling, undoubtedly correct, if applied to the evidence, would have excluded it.

The judgment is reversed and a venire de novo awarded.

In the Supreme Court of Pennsylvania, Eastern District.

COMMONWEALTH *vs.* WILLIAM H. JEANDELL.

1. Where an ordinary driver of a passenger railroad line is driving for hire for the company in the business of transporting passengers on and along the railway track on the Sabbath day, for the usual week-day fare, he is guilty of a breach of the peace.
2. The case of Commonwealth *vs.* Johnson, 10 Harris, 102; 2 American Law Register, 285 affirmed.
3. When worldly employment is carried on in such a manner and in such a place as to disturb the peace and religious exercises of the community, either at home or in churches, and cannot be restrained by the imposition of the penalty in the act, such circumstances constitute a breach of the peace.

Messrs. Porter and *Olmsted*, for the Commonwealth.

Messrs. Webster and *W. L. Hirst*, for defendant.

The facts of the case sufficiently appear in the opinion of the court which was delivered, (July 23, 1859,) by

THOMPSON, J.—The prisoner Jeandell was arrested on the 17th inst., by officer sergeant Orr, on instructions from the Mayor, while in the act of driving one of the cars of the Green and Coates street Passenger Railroad Company, filled with passengers, at Coates and Twenty-second street." The arrest took place about 1 o'clock P. M., of the day, and shortly after the starting of the car. He was one of the ordinary drivers of that line, and it is admitted was at the time driving for hire for the company, in the business of conveying passengers on and along the line of the company's road for the usual week-day fare. It appears from the letter of the President of the company to the Mayor, that it was the intention of the company to run their cars on the day mentioned under certain regulations, as to the rate of speed in passing churches, and by changing their bells for others making less noise. The Mayor having received the notice, thought it his duty to direct the arrest of those engaged in driving the cars, upon the grounds of a breach of the peace.